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Q. Pensions Borden Inc. V. Bakery & Confectionery Union & Industry International Pension

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based its appeal on the issue of market power. Kodak did, however, note in its brief that it believed its conduct constituted only a legal unilateral refusal to deal and not a tying arrangement.[600] The court responded to that assertion in a cryptic and inaccurate footnote that did little to resolve the issue.[601] However, the distinct implication of the Supreme Court's decision in *Kodak* is that the Ninth Circuit's holding on the tying arrangement issue was correct. Thus, the Fourth Circuit's conclusion that a written exclusionary sales term, when unsupported by evidence of an explicit agreement between the parties, clearly does not constitute a tying arrangement is questionable. Still, because no such written policy existed in *Data General*, the specific holding of the Fourth Circuit is probably secure.

Q. Pensions

Borden Inc. v. Bakery & Confectionery Union & Industry International Pension

974 F.2d 528 (4th Cir. 1992)

In 1980, Congress enacted the Multiemployer Pension Plan Amendments Act[602] (MPPAA) to cure defects in the Employee Retirement Income Security Act's[603] (ERISA) scheme for multiemployer pension plans. Before the MPPAA, when an employer chose to withdraw from a multiemployer pension plan with unfunded vested liability, it was not responsible for any of the liability. Remaining employers then had to increase contributions in order to fully fund the plan. These increased contributions would prompt more employers to withdraw from the plan, which increased contributions even further for remaining employers. As the contribution base shrank, the cycle continued until the pension plan was no longer viable because of prohibitively high contribution rates.

MPPAA section 1391[604] imposes withdrawal liability on employers leaving multiemployer pension plans in an amount equal to their pro rata share of the unfunded vested liability. This allocates all unfunded vested liability, at least conceptually, to some employer in the plan, so that even if all employers withdrew at once, the plan would be fully funded. The MPPAA also provides in section 1384[605] that if the employer conducts an arms-length

600. Brief for Petitioner at 15 n.4, *Eastman Kodak* (No. 90-1029).

601. *Eastman Kodak*, 112 S. Ct. at 2080 n.8. The court stated that Kodak's "alleged sale of parts to third parties on condition that they buy service from Kodak is not [a unilateral refusal to deal]." *Id.* This statement is not entirely responsive because Kodak sold not on the condition that buyers purchase Kodak services, but on the condition that buyers not purchase services from Kodak's competitors. *Id.* at 2077-78. In addition, the court seems to assume the existence of an overt agreement, which Kodak denied. Brief for Petitioner, *supra* note 600.

602. Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1453 (1988).

603. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1371 (1988).

604. 29 U.S.C. § 1391 (1988).

605. 29 U.S.C. § 1384 (1988).

sale of assets to a purchaser who agrees to assume the seller's obligation to contribute to the plan, there is no withdrawal liability for the seller. This section is meant to make it more appealing for employers to sell rather than close down companies.

In normal circumstances the provisions of sections 1391 and 1384 do not conflict. In calculating withdrawal liability under MPPAA section 1391(c)(2)(C), the pension fund uses a ratio of the employer's contribution into the plan to the total contributions into the plan by all employers during a five year period to determine the amount of liability.[606] If the employer sells the company in accordance with the terms of MPPAA section 1384, the seller incurs no withdrawal liability and the purchaser assumes any future liability for the year of the sale and the previous four years.[607] In effect, any potential withdrawal liability for the sold company for those five years is transferred to the purchaser.

A problem arises when a pension fund, under MPPAA section 1391(c)(5)(C), elects to calculate withdrawal liability based on the previous ten years' contribution instead of only the previous five. Any fund may make this election, although it is probably more likely to do so in an industry where a ten year history will give a more accurate assessment of an employer's share of contributions into the fund than a five year history. If an employer, in accordance with section 1384, sells a company contributing to a fund that has elected to use a ten year history, the MPPAA shifts the contribution history for the second five years to the purchaser. However, the MPPAA does not specify to whom, if anyone, the pension fund should assign the first five years of contributions in assessing withdrawal liability. The United States Court of Appeals for the Fourth Circuit considered this issue in a case of first impression, *Borden Inc. v. Bakery & Confectionery Union & Industry International Pension*.[608] The *Borden* court also considered whether a fund could assess interest on withdrawal liability for the year during which the withdrawal occurs, the gap year.

In *Borden*, the plaintiff, Borden Inc., owned a number of subsidiaries that were parties to collective bargaining agreements requiring contributions into the Bakery and Confectionery Union and Industry International Pension Fund (Fund). In 1986, Borden sold a subsidiary, Drake Bakeries, to Continental Baking Company. The transaction qualified as a section 1384 sale, so Borden incurred no withdrawal liability at the time of the sale. A year later, Borden closed down operations at two other subsidiaries that were required to contribute to the Fund. As a result of the closings, Borden incurred partial withdrawal liability. The Fund calculated the amount of this liability by determining Borden's total liability had it shut down all of its operations, and then reducing it in proportion to its remaining facilities still contributing to the plan. In calculating Borden's total liability, the

606. 29 U.S.C. § 1391 (1988).
607. 29 U.S.C. § 1384 (1988).
608. 974 F.2d 528 (4th Cir. 1992).

Fund multiplied the total unfunded, vested liability by a fraction obtained by dividing Borden's required contributions over the previous ten years on behalf of all of its subsidiaries by the total amount all employers contributed to the plan during the same period. When the Fund determined Borden's required contributions to the plan, they omitted contributions made on behalf of Drake for the year of Drake's sale and the preceding four years as required by section 1384, but included the contributions on behalf of Drake for the five years before that. Using this method of calculation, Borden was basically assessed liability for contributions on behalf of the two sold subsidiaries for the ten year period *and* for contributions on behalf of Drake for the first five years of that period. Borden's liability was $757,803. The Fund also charged Borden interest on the liability for the gap year—the year of withdrawal.

Borden argued that the Fund should not attribute contributions made on behalf of Drake for the first five years of the ten year period to them, because they had sold Drake the year before. If calculated without including such contributions, withdrawal liability would only have been $102,461. This demonstrates that Drake's first five years of contributions must have been quite large. Borden also objected to the assessment of gap year interest, noting that no language in the MPPAA gave the Fund the authority for such an assessment.

The parties submitted the case to arbitration, and the arbitrator found that the Fund's calculation of withdrawal liability was proper. The arbitrator, however, did not allow assessment of gap year interest. Both parties sought review in the United States District Court for the District of Maryland. On cross motions for summary judgment, the district court held that, because Borden had already sold Drake, the Fund could not use any contributions on behalf of Drake at any time during the ten year period to calculate Borden's withdrawal liability. The district court did allow the Fund to assess gap year interest. Both parties appealed this ruling to the Fourth Circuit.

The *Borden* court reversed on the gap year interest issue. Noting that the MPPAA is comprehensive and that it expressly authorizes interest in certain situations, the court interpreted the Act's silence on the issue of gap year interest to mean that the Fund cannot assess such interest. This interpretation of the MPPAA is in conflict with *Huber v. Casablanca Industries*, in which the United States Court of Appeals for the Third Circuit presumed one year of interest under the Act.[609]

To determine the proper method of calculating withdrawal liability, the *Borden* court looked to section 1391(c)(2)(C)(ii), which defines the fraction used in the calculation. The numerator of this fraction is "the total amount required to be contributed under the plan by the employer."[610] Taken

609. 916 F.2d 85 (3d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3503 (U.S. Jan. 22, 1991) (No. 90-1092).

610. 29 U.S.C. § 1391 (1988).

literally, this number would include all of Borden's funding obligations incurred over the previous ten years, regardless of the sale of Drake. Under MPPAA section 1384(b)(1), which provides: "the liability of the purchaser shall be determined as if the purchaser had been required to contribute to the plan in the year of sale and the four plan years preceding the sale the amount the seller was required to contribute for such operations for such five plan years," five of those years would also be used to calculate Continental's liability should it withdraw from the plan.[611] This interpretation might lead to a double recovery for the Fund. Because of the United States Supreme Court's decision in *Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs, United States Department of Labor*,[612] courts must assume that Congress does not mean to provide for double recovery, so the *Borden* court rejected this interpretation. To give effect to all of the MPPAA provisions, including section 1384, without allowing for double recovery, the Fund argued that courts should interpret section 1391(c)(2)(C)(ii) as including all of Borden's funding obligations for the ten-year period except those explicitly shifted under section 1384. This would eliminate any potential double recovery, and would give full effect to the provisions of section 1384.

In response to the Fund's argument, Borden pointed out that such an interpretation of the MPPAA undermines the purpose of section 1384(a)(1), which states that there shall be no withdrawal liability for an employer "solely because, as a result of a bona fide, arm's-length sale of assets to an unrelated party, the [employer] ceases . . . operations."[613] Borden noted that if Drake had been their only asset, when they sold that asset they would not have had any withdrawal liability with respect to any funding obligations during the ten years. Consequently, Borden argues, the result should be the same when the sold assets are merely a part of the employer's operations.

The Fund replied that using Borden's method of calculation essentially would deprive them of the option under MPPAA section 1391(c)(5)(C) to consider Drake's ten year contribution history. If the Fund cannot assign the first five years of Drake's ten year contribution history to Borden, it can attribute those years to no one. The *Borden* court pointed out that if the Fund cannot attribute the five-year period to Borden when withdrawal liability is calculated, the Fund may not attribute the period to Borden in calculating withdrawal liability for any other Fund participant. This results in the allocation of Drake's first five year contribution history to all active plan members, instead of assigning it to Borden or Continental.

The Fourth Circuit found Borden's method of calculation preferable, because it gives full effect to the provisions of both section 1384 and 1391.

611. 29 U.S.C. § 1384 (1988).

612. 461 U.S. 624, 637 n.14 (1983) (rejecting statutory interpretation resulting in double recovery).

613. 29 U.S.C. § 1384 (1988).